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Beverly Enterprises-Massachusetts, Inc. d/b/a East Village Nursing and Rehabilitation Center and Service Employees International Union, Local 285, AFL-CIO. Case 1-CA-35233

September 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge and amended charge filed on May 13 and July 9, 1997, the General Counsel of the National Labor Relations Board issued a complaint on July 15, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 1-RC-20533. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On August 19, 1997, the General Counsel filed a Motion for Summary Judgment. On August 20, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and request for reconsideration.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of its contention in the representation proceeding that the unit charge nurses are statutory supervisors.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.¹ We therefore find that the Respondent has

¹In its "Response to the Notice to Show Cause and Request for Reconsideration," the Respondent requests reconsideration on the grounds that the Regional Director failed to consider the Respondent's argument that the charge nurses failed to exercise their authority to discipline because they were also concerned that this might impede the organizing efforts. Further, the Respondent asserts that there is newly discovered evidence consisting of a transcript of the preliminary injunction hearing in *Maryleen LaRoche v. Emil Jean Andre*, Middlesex Superior Court Civil Action No. 96-3011, in

not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Lexington, Massachusetts, has been engaged in the operation of a nursing home. Annually, the Respondent, in conducting its business operations, derives gross revenues in excess of \$100,000 and purchases and receives at its Lexington facility goods valued in excess of \$5000 directly from points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held February 27, 1997, the Union was certified on March 10, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time registered nurses and licensed practical nurses employed by the Respondent at its Lexington, Massachusetts facility, including per diems, but excluding medical records employees, all other employees, mana-

which a charge nurse employed by the Respondent sought a preliminary injunction against a former employee of the Respondent. The Respondent contends that the transcript includes testimony by the charge nurse that she was the former employee's immediate supervisor, contrary to testimony given at the representation hearing, and that the testimony also supports and corroborates the Respondent's argument that nurses possessed authority to discipline, but did not exercise that authority because they were afraid of retaliation. As the Respondent acknowledges however, the Regional Director, in her Decision and Direction of Election, found that the charge nurses' motives for refusing to exercise authority were irrelevant. The Regional Director reasoned that, in light of the Employer's failure to discipline charge nurses for failing to exercise the supervisory authority that the Employer attempted to confer on them, the Employer has done nothing more than confer on them "paper authority" to discipline, which is insufficient to establish supervisory status. Thus, even assuming arguendo that the transcript testimony constitutes newly discovered evidence, it would not warrant a hearing.

²Member Higgins notes that he dissented and would have granted review in the underlying case. However, he agrees with his colleagues that the Respondent has raised no new issues in this "technical" 8(a)(5) proceeding warranting a hearing and that summary judgment is appropriate.

gerial employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since about May 1, 1997, the Union has requested the Respondent to bargain and, since about May 2, 1997, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after about May 2, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Beverly Enterprises-Massachusetts, Inc. d/b/a East Village Nursing and Rehabilitation Center, Lexington, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Service Employees International Union, Local 285, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time registered nurses and licensed practical nurses employed by the Respondent at its Lexington, Massachusetts facility, including per diems, but excluding medical records employees, all other employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Lexington, Massachusetts, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 1997

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Service Employees International Union, Local 285, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time registered nurses and licensed practical nurses employed by us at our Lexington, Massachusetts facility, including per diems, but excluding medical records employees, all other employees, managerial employees, guards, and supervisors as defined in the Act.

BEVERLY ENTERPRISES-MASSACHU-
SETTS, INC. D/B/A EAST VILLAGE NURS-
ING AND REHABILITATION CENTER